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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. .....

FRED STALDER, MICHAEL K. BENNETT, CONRAD REAM and ROBERT REAM ..... Petitioners

vs.

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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THE ATKINS CHRONICLE — ATKINS, ARK

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	12-23
1. The Court erred in failing to grant defendants' motion to dismiss on the grounds of the wrongful destruction and tampering with the evidence; and the wrongful interference with the defense request for testing of the alleged contraband misappropriated by Sheriff Davis	12
2. The Court erred in refusing to dismiss the grand jury indictment against the defendants after it was shown that the United States attorney, in presenting information to the grand jury, made a false and misleading statement to the grand jury that a co-defendant, Conrad Ream, had confessed and implicated the defendants, Fred Stalder and Robert Ream	24
SUMMARY AND CONCLUSION	29

APPENDIX "A"—Opinion of United States Court of Appeals for the Eighth Circuit A-1

APPENDIX "B"—Order of United States District Court, Eastern District of Arkansas, Western Division A-4

APPENDIX "C"—Findings of Fact and Conclusions of Law, United States District Court, Eighth District of Arkansas, Western Division A-6

APPENDIX "D"—Order of United States District Court, Eastern District of Arkansas, Western Division A-13

CASES CITED

Barbee v. Warden, 331 F. 2d 842, 845 (4th Cir. 1964) 20

Brady v. Maryland, 373 U.S. 87, 83 S. Ct. 1194 19

Curran v. Delaware, 259 F. 2d 707, 711 (3d Cir. 1958) 19

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 18

Giles v. Maryland, 386 U.S. 66, 73-74, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) 19

Griffin v. United States, 87 U.S. App. D. C. 172, 183, F. 2d 990, 993 (1950) 19

Jackson v. Wainwright, 390 F. 2d 288, 295 (5th Cir. 1968) 19

Levin v. Katzenbach, 124 U.S. App. D. C. 158, 363 F. 2d 287, 291 (1966) 19

Seattle v. Fettig, 10 Wash. App. 773, 519 P. 2d 1002 (1974) 18

State v. Wright, 557 P. 2d 1, (1976) 20

United States v. Alsbrook, 336 F. Supp. 973, 980 n. 15 (D.D.C. 1971) 21

United States v. Asdrubal-Htrrera, 470 F. Supp. 939 (D.C.N.D. Ill. 1979) 26

United States v. Consolidated Laundries Corp., 291 F. 2d 563, 571 (2d Cir. 1961) 19

United States v. Harrison, 173 U.S. App., D.C. 260, 524 F. 2d 421, 429 n. 20 (1975) 21

United States v. Perry, 153 U.S. App. D.C. 89, 471 F. 2d 1057, 1063 (1972) 18

United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1979) 26

United States v. Thomas, 320 F. Supp 527 (D.D.C. 1970) 27

STATEMENT OF ISSUES

I.

The Court erred in failing to grant defendants' motion to dismiss on the grounds of the wrongful destruction and tampering with the evidence; and the wrongful interference with the defense request for testing of the alleged contraband misappropriated by Sheriff Davis.

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Brady v. Maryland, 373 U.S. 87, 83 S. Ct. 1194 21

Curran v. Delaware, 259 F. 2d 707, 711 (3d Cir. 1958) 19

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 18

Giles v. Maryland, 386 U.S. 66, 73-74, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) 19

Griffin v. United States, 87 U.S. App. D.C. 172, 183, F. 2d 990, 993 (1950) 19

Jackson v. Wainwright, 390 F. 2d 288, 295 (5th Cir. 1968) 19

Levin v. Katzenbach, 124 U.S. App. D.C. 158, 363 F. 2d 287, 291 (1966) 19

Seattle v. Fettig, 10 Wash. App. 773, 519 P. 2d 1002 (1974) 18

State v. Wright, 557 P. 2d 1, (1976) 20

United States v. Alsbrook, 336 F. Supp. 973, 980 n. 15 (D.D.C. 1971) 21

United States v. Consolidated Laundries Corp., 291 F. 2d 563, 571 (2d Cir. 1961) 19

United States v. Harrison, 173 U.S. App., D.C. 260, 524 F. 2d 421, 429 n. 20 (1975) 21

United States v. Perry, 153 U.S. App. D.C. 89, 471 F. 2d 1057, 1063 (1972) 18

II.

The Court erred in refusing to dismiss the grand jury indictment against the defendants after it was shown that the United States attorney, in presenting information to the grand jury, made a false and misleading statement to the grand jury that a co-defendant, Conrad Ream, had confessed and implicated the defendants, Fred Stalder and Robert Ream.

CASES

United States v. Asdrubal-Herrera, 470 F. Supp. 939 (D.C.N.D. Ill. 1979) 26

United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1979) 26

United States v. Thomas, 320 F. Supp. 527 (D.D.C. 1970) 27

RULES

Canons of Professional Ethics, ABA, 28 C.F.R. §45-735-1 (b) 27

ABA Standards, The Prosecution Function, §3.5 (b) & §5.7 (1971) 27

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Petitioners, Fred Stalder, Michael K. Bennett, Conrad Ream and Robert Ream, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the opinion of the United States Eighth Circuit Court of Appeals entered in this proceeding on the 11th day of November, 1980.

Opinions Below

The opinion of the Court of Appeals below (Appendix A), will not be published, in accirdance with directions received from the court. The order of the United States District Court, Eastern District of Arkansas, Western Division, was entered April 25, 1980, (Appendix B) and an order of said court was entered April 30, 1980, (Appendix C), These orders wtre not designated for publication.

Jurisdiction

The judgment of the United States Court of Appeals, Eighth Circuit, was entered on the 11th day of November, 1980. Rehearing was not sought. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the Court erred in failing to grant Defendants' Motion to Dismiss on the grounds of the wrongful destruction and tampering with evidence; and the wrongful interference with the defense request for testing of the alleged contraband misappropriated by Sheriff Davis.

2. Whether the Court erred in refusing to dismiss the Grand Jury Indictment afainst the Defendants after it was shown that the United States Attorney, in presenting information to the Grand Jury, made a false and misleading statement to the Grand Jury that a co-defendant, Conrad Ream, had confessed and implicated the defendants, Fred Stalder and Robert Ream.

Constitutional and Statutory Provisions Involved

21 U. S. C. §846:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed by the offense, the commission of which was the object of the attempt or conspiracy.

Statement of the Case

On October 3, 1978, a plane landed on an airstrip near Heber Springs, Arkansas, in an area known as "Hellcat Heights". In attempting to take off from said airstrip, the plane evidently turned over a Hertz rental truck. This truck was discovered and reported to Sheriff Ron Davis later the same day, and allegedly contained approximately 6,500 pounds of marijuana packed in boxes and bales of approximately 42 pounds each. Sheriff Ron Davis immediately called in the assistance of the Arkansas State Police and the federal Drug Enforcement Agency (DEA). The Arkansas State Police responded by sending Sergeant Lynn Chachere, a criminal investigator, to assist, and the federal DEA sent the following three agents: Johnny Maack, Larry Carver and Michael Vowell.

Representatives of the three agencies then placed a stakeout on the overturned truck and on the following day, October 4, two persons were arrested, namely Robert Ream, one of the defendants in this cause, and a Joe Kelly. They were charged in the Circuit Court of Cleburne County, Arkansas with

the offense of possession of marijuana for sale. After their arrest the truck was righted and was taken to the rural home of Deputy Sheriff Gerry Holmes located appoximately eight miles from Heber Springs, Arkansas, where it was locked with a padlock and Deputy Holmes was given the key. (Tr. 178) The truck was left in the sole custody of Deputy Holmes, who had been up the previous two days and the previous night on the stakeout, to guard until the following morning. (Tr. 316) There is some question as to whether or not the truck was weighed, but the Government's contention is that Deputy Holmes weighed it on a bulk scale and that by subtracting the weight from the empty truck wenght, determined there were 6,500 pounds of alleged marijuana on the truck. (Tr. 213 and 229) It is admitted by the government in its answer to request for information, that the weight ticket was either lost or destroyed. On the following day, October 5th, representatives of the county, state and federal Government met to esort the truck to North Little Rock, Arkansas. Just prior to leaving the home of Deputy Holmes, however, Sheriff Ron Davis stated that he wanted to keep some of the alleged marijuana, and the truck was unloaded and three bales or boxes

were placed in an unlocked wooden shed behind Deputy Holmes' house. (Tr. 173 and 302) After this took place the truck was escorted to North Little Rock, Arkansas's public incinerator where the convoy was met by Mr. Manuel Holcomb, Chief Chemist for the Arkansas Crime Lab, and by Mary Buehler, assistant chemist. Mr. Holcomb took a picture of the alleged marijuana before it was destroyed and, when compared to the picture taken at the airstrip on Hellcat Heights, shows that a large amount of the alleged marijuana was missing. Mrs. Buehler took eighteen random samples from each forklift load of the bales and boxes before it was destroyed. (Tr. 291)

These samples tested positive for marijuana and were retained by her for trial purposes. Arkansas State Police Sergeant Lynn Chachere, having become concerned about the alleged marijuana removed from the truck by Sheriff Davis, delivered a confidential memo to his superior (Tr. 174) resulting in directions that he determine the amount of marijuana removed and obtain a receipt from Sheriff Ron Davis. By using large scales that were present at the incinerator, Sergeant Chanchere weighed three bales of the alleged marijuana, which he considered to be

average, coming up with an approximate average weight of 42 pounds per bale. Thereafter he received a receipt from Sheriff Ron Davis for 120 pounds of marijuana which receipt was made part of the record in this cause. (Tr. 173-174) No other effort was made to weigh the alleged marijuana before it was destroyed and no effort was made to count the number of bales on the truck. However, both Sergeant Lynn Chachere and assistant chemist Mary Buehler estimated that there were 40 to 50 bales at the most, with an average weight of 42 pounds. This would indicate that there was between 1,680 and 2,100 pounds of marijuana with no explanation as to what happened to the remaining portion of the original 6,500 pounds. (Tr. 291 and 295) It is admitted that no court order was obtained for the destruction of the marijuana and that the defendants did not have an opportunity to examine it. It is also admitted that representatives of the county, state and federal drug enforcement agencies were all present at the destruction, though it is not clear who was in charge.

Thereafter, beginning on August 22, 1979, the defendant Robert Ream was tried in the Ciruit Court of Cleburne County, Arkansas for the charges pend-

ing against him. Joe Kelly had since become a witness for the federal Government and was not tried. At the state court proceeding all members of law enforcement testified that all of the marijuana had been destroyed at the incinerator; and denied any tampering or removal of any of the contriband from the truck, prior to its destruction. On the fifth day of trial the matter of the missing marijuana which was in Sheriff Ron Davis' possession became known to the defendant and he moved for dismissal by reason of the wrongful suppression of evidence and falsification of testimony. However, the court granted a mistrial. At this point the defendant's counsel formally moved the court for the right to inspect and test the marijuana in Sheriff Ron Davis' possession for the purpose of determining if it was in fact marijuana; and to see if they could determine where it was grown. However, Sheriff Ron Davis, two days later (the following Monday), (Tr. 337) without a court order or notice to the defense, took the alleged marijuana in his possession to Little Rock to the State Crime Lab where it was promptly destroyed, without any test or analysis being performed, and without an opportunity for defendant's counsel to examine it or run any test on the substance. (Tr. 279-

280) The state court case is presently on appeal to the Supreme Court of Arkansas to determine whether it should have been dismissed.

Thereafter, the federal Government stepped into the picture and subpoenaed certain persons before the federal grand jury in Little Rock, Arkansas for the purpose of obtaining indictments arising out of the aforementioned alleged marijuana by said federal grand jury. The Assistant United States Attorney Don Curdie, which examining defendant Fred Stalder about his relationship with Conrad Ream, asked him the following question:

> MR. CURDIE: "Has Mr. Ream told you that he has given testimony that you were present at that airstrip on the 2nd of October, and that you took part in the transportation of the marijuana from Columbia to Heber Springs, Arkansas; and that you and Robet Ream flew to Harrisonville, Missouri after the truck that the marijuana was loaded into, after it was flown to Heber Springs, overturned."

This question was false, as it was shown in a hearing on a motion to dismiss the indictment in this cause that the defendants Robert Ream and Conrad Ream never had testified before the grand

jury, nor had they testified in the state court proceedings, nor had they made any statements or confessions whatsoever. (Tr. 356-357) The federal grand jury returned indictments against the defendants Conrad Ream and Robert Ream, Fred Stalder and Michael K. Bennett, and others, resulting in the present case.

Motions were filed by all defendants in this cause to dismiss the charges because of the destruction of evidence; to dismiss the charges because of improper inference given the grand jury by the Assistant United States Attorney that Conrad Ream had confessed and implicated in his testimony defendant Stalder and his brother, Robert Ream; and to suppress the testimony of Ardell Mears since he had gained information at a time when he was at least ostensively the client of attorney Laws, and privy to confidential information regarding the defense of Stalder, Bennett and Robert and Conrad Ream.

When the court overruled each of these motions, defendants Stalder, Robert Ream and Conrad Ream, stipulated the facts were true as charged in one count of the indictment, and allowed the court to so find

and sentence them. The United States Government dismissed the felony charges pending against Michael K. Bennett and charged him in the same cause with a misdemeanor, to which the same stipulation was entered and sentence given. In the stipulation all four defendants reserved all their rights to appeal the court's decision on the above mentioned motions.

I.

THE COURT ERRED IN FAILING TO GRANT DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF THE WRONGFUL DESTRUCTION AND TAMPERING WITH THE EVIDENCE; AND THE WRONGFUL INTERFERENCE WITH THE DEFENSE REQUEST FOR TESTING OF THE ALLEGED CONTRABAND MISAPPROPRIATED BY SHERIFF DAVIS.

When the large truck was found overturned on an airstrip known as "Hellcats Heights" near Heber Springs, Arkansas, containing what purported to be a large quantity of marjuana, the Cleburne County Sheriff's Department called in the assistance of the United States Government through the Drug Enforcement Agency, hereinafter referred to as DEA, and the Arkansas State Police to help in its investigation. On October 4 two suspects, one of whom is one of the present defendants, Robert Ream, were arrested in the vicinity of the overturned truck. Later that day the truck was taken to the home of Deputy Sheriff Gerry Holmes, located in a secluded area approximately eight miles from Heber Springs, Arkansas, where it was padlocked and stored over

night in the sole custody of deputy Holmes, who retained the padlock key. (Tr. 180)

The following day, October 5, representatives from the State Police and the Cleburne County Sheriff's Department went to Deputy Sheriff Holmes' residence to reclaim the contraband and to transport it to North Little Rock, Arkansas to the city incinerator. At this time Sheriff Ron Davis removed three bales from the truck and placed them in an unlocked barn where they allegedly remained stored for approximately eleven months. A receipt was subsequently procured from Sheriff Davis by the State Police Investigator, Lynn Chachere, a few days later following a confidential memo from Sergeant Chachere to his supervisor concerning the removal of the marijuana. (Tr. 175) It is alleged that some time on the 4th or 5th of October the truck was weighed by Deputy Holmes and that the marijuana weighed approximately 6,500 pounds, however, he claims to have lost the weight receipt. The marijuana was taken in convoy containing state, county and federal officers, to the incinerator in North Little Rock, Arkansas, where Chief Chemist Manuel Holcomb and his assistant, Mary Buehler, inspected the

marijuana and took eighteen random samples. (Tr. 291)

Even though the Arkansas State Police knew at the time of destruction that a portion of the marijuana had been misappropriated by the Sheriff, and that there had been other opportunities for tampering with the evidence while left overnight with Deputy Holms, who had retained the key, they permitted the evidence to be destroyed without determining the extent of tampering or pilferage. The State Police admitted that no more than 50 males of contraband reached the incinerator, weighing approximately 42 pounds each, or a total weight of approximately 2,000 pounds. It was obvious that two-thirds of the load or approximately 4,500 pounds had somehow vanished from the Holmes farm. At the time of the destruction, the Arkansas State Police unquestionably knew two things: One, that 4,500 pounds, or thereabouts, of the alleged contraband had vanished and the load had been tampered with; and two, Sheriff Davis was seen removing three bales of the contraband and secreting it in the Holmes barn. There is no question that this in itself constitutes, under these circumstances, a "bad faith destruction" of the evidence. The two agents for the DEA were

present before and after the tampering and, therefore, had to have knowledge that the size of the load had been drastically depleted. It evidently appears everybody neglected to either weigh the load or count the bales, which explains why there was no federal prosecution at the outset for approximately 1½ years. The marijuana was admittedly hastily destroyed without any semblance of a court order, or any opportunity for examination by the defendants. State charges were filed against defendant Robert Ream and the government witness Joe Kelly, and a trial was held during the week of August 22, 1979. During the course of the trial members of the law enforcement testified concerning the storage, safe keeping and custody of the contraband up to its destruction.. All denied any tampering or pilferage or other misappropriations and claimed the truck was never opened and that the entire 6,500 pounds reached the incinerator and were destroyed. During the presentation of the defense case, information developed that the Sheriff had misappropriated three bales, which was still secreted in the Holmes' barn. At this point in the proceedings the defense formally moved the state court for the right to inspect and test the contraband from the Holmes' barn to de-

termine whether it was marijuana, and to determine where it had been grown or produced. This is admitted in stipulation by counsel on Page 255 of the transcript. However, before defendants were able to examine said marijuana, it was hastily carried by Sheriff Davis to the State Crime Lab with directions to destroy it. No chemical analysis of any kind was made of the contraband from the Holmes' farm. The defense was a second time deprived of the right to test or examine the evidence, and deprived of the right to prove tampering with the evidence and the full extent of the misappropriations or tampering. The state proceeding resulted in a mistrial because of the handling of the evidence. Defendants, however, had moved for a dismissal and this matter is presently on appeal to the Supreme Court of the State of Arkansas. While the testimony was that the federal DEA agents were not in charge of the investigation per se, it is admitted that they were present at all stages of the investigation from discovery of the evidence to its destruction. (Tr. 226, 227 and 228)

There was other evidence to suggest an entire household of improprieties in the conduct of the investigation, i. e., letters which would have proven

that Mears was the lessee or person who rented the truck, rather than Ream and Kelly as they claimed, were lost or destroyed by the Sheriff, even the airport itself was by person or persons unknown physically removed and vanished without a trace. There was no explanation given for this missing 4,500 pounds of alleged marijuana. The pilot of the plane, Keat Griggers, turned government witness; Joe Kelly, who flew with the pilot to import the alleged marijuana into this country, was given immunity; Ardell Mears, who was to receive the contraband, and store and distribute it from his lake house on Greers Ferry, together with his wife, received immunity.

No action of any kind was taken against the sheriff or his deputies, or any of those who may have been involved in the misappropriation of the cargo.

It is obvious that when the state proceeding reached the point of awkward embarressment for the local officers, the D. E. A. was finally prevailed upon to initiate prosecution through the federal system. In the U. S. Attorney's pleadings, he characterizes the act of the sheriff in misappropriating the contraband as "retaining it for evidence" and his false testimony as "forgetting". Thre was no ques-

tion, however, as to how the State Police characterized his behavior in its confidential memo—and tried to subtly remind him of the seriousness of his act.

The Appellants here contend they were denied due process and the right to a fair and impartial trial by the misbehavior of the law enforcement.

Due process imposes certain procautions on law enforcement and investigatory agencies to insure that each criminal trial is a search for the truth and not an adversary game. **United States v. Perry,** 153 U. S. App. D. C. 89, 471 F. 2d 1057, 1063 (1972). One such constitutional obligation, the disclosure of evidence to the defendant, is well established. "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **Brady v. Maryland,** 373 U. S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963). See **Giglio v. United States,** 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); **Seattle v. Fettig,** 10 Wash. App. 773, 519 P. 2d 1002 (1974).

Under the rule governing suppression of evidence, the circumstances surrounding the nondis-

closure, including the motivation of the party responsible for the suppression, are irrelevant. See g., **Jackson v. Wainwright,** 390 F. 2d 288, 295 (5th Cir. 1968); **United States v. Consolidated Laundries Corp..,** 291 F. 2d 563, 571 (2d Cir. 1961) This is so because the constitutional requirement is "not punishment of society for misdeeds of a prosecutor, but avoidance of an unfair trial to the accused." **Brady v. Maryland,** supra, 373 U. S. at 87, 83 S. Ct. at 1197. The United States Supreme Court has not attempted to precisely define "material evidence" or the degree of prejudice which must be shown by the defendant to make out a violation. See **Giles v. Maryland,** 386 U. S. 66, 73-74, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) Other courts have defined materiality quite broadly. See **Levin v. Katzenbach,** 124 U. S. App. D. C. 158, 363 F. 2d 287, 291 (1966) (evidence which "might have led the jury to entertain a reasonable doubt about (the defendant's) guilt"); **Griffin v. United States,** 87 U.S. App. D. C. 172, 183, F. 2d 990, 993 (1950) ("evidence that may reasonably be considered admissible and useful to the defense"); **Curran v. Delaware,** 259 F. 2d 707, 711 (3d Cir. 1958) (("pertinent facts relating to (the) defense"). Of course, neither the police nor the prosecution are to decide

for the defense what is favorable or material evidence. Cf. **Barbee v. Warden,** 331 F. 2d 842, 845 (4th Cir. 1964); **Griffin v. United States,** supra at 993. If the defense has established that the suppressed evidence is material, the court may conclude that due process has been denied and that the error can be corrected by a new trial at which the defendant will have full access to the evidence.

In cases like the one before us, however, the approach outline above is not feasible. Here the evidence has been destroyed and the defendants are unable to examine and review the same. The amount of marijuana was not weighed or measured by any law enforcement agency and the amount set out in the indictment is merely a guesstimate. The marijuana was not destroyed on any court order but was evidently, according to the answers to the request for discovery, destroyed because they did not have a suitable place to store it. This, of course, is not a valid reason for destruction of material evidence. In the case of **State v. Wright,** 557 P. 2d 1, a 1976 Washington case directly in point, there was certain evidence that would require freezing. In that case the police officers destroyed the evidence since there

was no room in the freezer to store it and the court held that this was in no way a valid reason for destruction.

It is not necessary, as the U. S. Attorney evidently thinks, that the destruction be in "bad faith". The Wright case specifically held that the motivation of the destruction is not material. The purpose of the duty of preservation is to insure a fair trial for the accused and not to punish police officers. See **Brady v. Maryland,** 373 U. S. 87, 83 S. Ct. 1194. In the case at bar the destruction was intentional. No effort was made to preserve the evidence. No effort was made to secure a court order for its destruction and no effort was made to notify the defendants prior to its destruction. Neither administrative convenience nor inadequate facilities justify failure to preserve potential evidence in such cases. See **United States v. Harrison,** 173 U. S. App., D. C. 260, 524 F. 2d 421, 429 n. 20 (1975); cf. **United States v. Alsbrook,** 336 F. Supp. 973, 980 n. 15 (D.D.C. 1971).

The defendants maintain that the evidence destroyed in this case was material to their cause of action in that:

One: The amount of marijuana involved is crucial to the trial of this cause.

Two: Adequate testing could determine the type of marijuana and what location it was manufactured in, which is an essential element of the crime charged.

Three: Adequate testing could determine whether, in truth or fact, the material found is marijuana or some other closely resembled substance.

Four: The extent of pilferage or tampering with the evidence by law enforcement, and the integrity of the chain of custody or possession..

The District Court was evidently quite concerned about the manner in which the evidence had been handled in this case. In her opinion on page 350 of the transcript, the court stated:

> "The Court agrees with statements made by counsel for both the defendants and the government that this case has certainly been bungled and that the officers have not lived up to the highest standards of their profession. But the Court finds that the marijuana was burned at the direction of the Arkansas State Police and that the DEA and federal officials that were in-

volved were more or less acting subserviant to them in that they were assisting. And the Court thinks there is a lack of showing of any bad faith on the part of the federal agents.

Now, it might have been poor judgment in that they didn't step in and say, "Let's don't do this, let's wait awhile." And I think it's imperative that thee officials handling cases like this be aware of the fact that the evidence, which should be introduced and should be available to both sides at the time of trial, be available to the Court if it's needed during the trial. It's very dangerous to destroy the evidence . . . "

A good review of the law on this subject is contained in 75 Columbia L. R. 1355 Pages 1375 to 1380, "The Right to Independent Testing: A New Hitch in the Preservation of Evidence".

It is submitted that the court erred in failing to suppress the evidence in this case which had been improperly handled and improperly destroyed, thereby denying the defendants the right to a fair trial and a fair opportunity to examine the evidence to be used in their trial.

II.

THE COURT ERRED IN REFUSING TO DISMISS THE GRAND JURY INDICTMENT AGAINST THE DEFENDANTS AFTER IT WAS SHOWN THAT THE UNITED STATES ATTORNEY, IN PRESENTING INFORMATION TO THE GRAND JURY, MADE A FALSE AND MISLEADING STATEMENT TO THE GRAND JURY THAT A CO-DEFENDANT, CONRAD REAM, HAD CONFESSED AND IMPLICATED THE DEFENDANTS, FRED STALDER AND ROBERT REAM.

The record in this case shows that the Assistant United States Attorney, Don Curdie, while conducting the grand jury investigation and in examining the defendant, Fred Stalder, falsely implied to the grand jury that co-defendant Conrad Ream had confessed and implicated defendants Fred Stalder and Robert Ream. While examining defendant Fred Stalder about his relationship with Ream, the Assistant U. S. Attorney asked Mr. Stalder the following question:

> "Has Mr. Ream (Conrad) told you that he has given testimony that you were present on the airstrip on the 2nd day of October and that you

took part in the transportation of the marijuana from Columbia to Heber Springs, Arkansas, and that you and Robert Ream flew to Harrisonville, Missouri after the truck that the marijuana was loaded onto after it was flown to Heber Springs overturned?" (Tr. 359)

There was no basis in fact for this insinuation. The U. S. Attorney was aware of the entire investigation in this cause and admitted having a copy of the transcript of the state trial. He knew that Conrad Ream had never confessed or given any testimony whatsoever in state court or before the grand jury, other than to state his name, address and occupation. Under these circumstances the defendants made a motion to dismiss the grand jury indictment because of the statement made by the Assistant U. S. Attorney to defendant Fred Stalder while on the witness stand testifying before the grand jury.

On Page 359 of the transcript, in trying to explain this question, the following testimony took place:

THE COURT: Where did you get the information that he testified in the state trial?

MR. CURDIE: From conversations with agents that I was working with.

THE COURT: And you went before the Grand Jury on the basis of conversations that you'd had and asked questions that seem to be statements of fact?

MR. CURDIE: Your Honor, I do it all the time. It's conversations to me — it's an investigatory process, Your Honor.

THE COURT: All right. You don't have anything else to say in defense of your position?
MR. CURDIE: No, I don't.

Prosecutorial misconduct before a grand jury can be grounds for dismissal of the indictment. **United States v. Samango,** 450 F. Supp. 1097 (D. Hawaii 1979). In that case the United States Attorney relied upon transcripts from a previous hearing which he had reason to believe were perjured. In **United States v. Asdrubal-Herrera,** 470 F .Supp 939 D.C.N.D. Ill. 1979), the indictments were dismissed where the prosecutor knowingly presented false evidence, which was injurious to the defendant, to the grand jury. In that case the court said that the trust of the grand jury in the United States Attorney was misplaced and the indictments were not based upon independent and informed information.

It should be pointed out that the United States Attorney is subject to the Constitution, statutes, court rules, and case law as any other person. Attorneys employed by the United States are subject to the **Canons of professional ethics of the American Bar Association.** 28 C.F.R. §45-735-1 (b). While the **American Bar Association Projects On Standards for Criminal Justice, Standards Relating to Prosecution Function,** are not binding on the court, it has been recognized as setting the proper standards of professional conduct. **United States v. Thomas,** 320 F. Supp. 527 (D.D.C. 1970). In the context of grand jury practice, the ABA standards state as follows:

> "The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be unpermissible at trial before a petit jury." **ABA Standards, The Prosecution Function** §3.5 (b) (1971).

The Standards go on to state as follows:

> "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence." **ABA Standards, The Prosecution Function** §5.7 (1971).

There is no question in the case at bar that the statement made by Assistant United States Attorney

Don Curdie in the grand jury room was unprofessional conduct and a violation of these rules, since it certainly implied to the grand jury that the defendant Conrad Ream had already confessed to the crime and had implicated Fred Stalder.

Mr. Curdie knew when the statement was made that it was false. He was certainly aware that Mr. Ream had not made any statements whatsoever to the grand jury, as he admitted on April 28 to this court. He also had in his possession at that time a complete transcript of the state trial in this matter and knew that Mr. Ream had not taken the stand or made any statements in the state court trial

It is respectfully submitted that the only effective way this court has of supervising the conduct of the United States Attorney before the grand jury is to dismiss indictments predicated upon prosecutorial false statements and unprofessional conduct.

It is further submitted that the court erred in not dismissing the indictment against Fred Stalder, Conrad Ream and Robert Ream since the grand jury could have returned the indictment based upon the prosecutor's false statement that Conrad Ream had confessed and implicated Fred Stalder and Robert Ream.

SUMMARY AND CONCLUSION

Appellants, therefore, pray this court enter an order dismissing the indictments against these appellants for the reasons set out above.

Respectfully submitted,

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ATTORNEY FOR CONRAD REAM
and ROBERT REAM, Appellants

and

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ATTORNEY FOR FRED STALDER and
MICHAEL K. BENNETT, Appellants

By: IKE ALLEN LAWS, JR.

CERTIFICATE OF SERVICE

A copy of the foregoing was served on the United States of America by serving Solicitor General, Department of Justice, Washington, D. C. 20530, and upon Don Curdie, Assistant U. S. Attorney, U. S. Courthouse and Postoffice Building, Little Rock, Arkansas 72203, by depositing the document in the United States Postoffice at Russellville, Arkansas, with first-class postage prepaid, addressed to said counsels, at their addresses above stated, on this 30 day of December, 1980.

Ike Allen Laws

IKE ALLEN LAWS, JR.

L. Gene Worsham

L. GENE WORSHAM

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 80-1551 and 80-1552

No. 80-1551

UNITED STATES OF AMERICA ..... Appellee

v.

FRED STALDER and MICHAEL K. BENNETT ..... Appellants

Appeal from the United States District Court for the Eastern District of Arkansas

No. 80-1552

UNITED STATES OF AMERICA ..... Appellee

v.

CONRAD REAM and ROBERT REAM .... Appellants

Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: October 16, 1980

Filed: November 11, 1980

Before LAY, Chief Judge, BRIGHT and McMILLIAN, Circuit Judges.

PER CURIAM.

Defendants Stalder, Bennett, Conrad Ream and Robert Ream appeal their convictions under 21 U.S.C. §§ 841 (a), 846, and 952 (2). We affirm for the reasons stated below.

The first allegation of error concerns the district court's deniel of defendants' motion to dismiss the federal grand jury indictments because of wrongful destruction of evidence by the government. The evidence in question consisted of a large quantity of marijuana which was destroyed by law enforcement officials after samples had been taken because of lack of storage facilities. Defendants contend that they were harmed by the destruction of the evidence. The record is not clear as to the exact quantity of marijuana that was confiscated and defendants suggest that they were in some way harmed in that they were denied an opportunity to inspect the marijuana samples taken by the chemist. The record indicates, and it is uncontroverted, that the evidence was available for defendants' inspection. The district court correctly denied defendants' motion.

Defendants also allege that the district court erred in refusing to suppress the testimony of Ardell Mears. It was alleged that Mears, who was named in

the original indictment and lated agreed to testify for the government, had employed the same attorney as the defendants and later provided confidential information to the United States Attorney's office. There is no evidence that any confidential evidence was disclosed to the government by Mears' attorney. **Masterian v. McManus**, 554 F. 2d 813, 821 (8th Cir. 1977). See **Weatherford v. Bursey**, 429 U.S. 545 (1977).

The third and final contention is that the district court erred in refusing to dismiss the indictment on the basis of prosecutorial misconduct before the grand jury. Though the prosecutor did ask a question based on false information, it does not appear that this incident alone so prejudiced the grand jury so as to require a dismissal of this indictment. **United States v. Blue**, 384 U.S. 251, 255 n. 3 (1966); **United States v. Cady**, 567 F. 2d 771, 776 (8th Cir. 1977).

Accordingly, the judgment of the district court is affirmed.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA ..... Plaintiff

v. No. LR-CR-80-8

CONRAD REAM (1)
WILLIAM GORDON GREEN (3)
FRED STALDER (4)
ARDELL MEARS (5)
ROBERT REAM (6)
MICHAEL K. BENNETT ..... Defendants

O R D E R

A hearing on pending motions having been held in this case on April 11, 1980, IT IS HEREBY ORDERED:

Defendants' motion to suppress the testimony of Ardell Mears is denied.

Regarding the Government's motion on conflict of interests, the Court heard testimony of defendants Fred Stalder, Michael K. Bennett, Robert Ream,

and Conrad W. Ream, Jr. Each of these defendants was informed fully of his right to have separate counsel and of the possibility of a conflict of interests; however, each defendant individually waived his right to have separate counsel. The United States Attorney was afforded the opportunity to cross examine each of these defendants on that issue. After hearing all evidence, the Court held that the defendants' attorneys would not be disqualified since the defendants individually had stated that they recognized that their rights had been waived on this issue.

IT IS SO ORDERED.

Dated this 25th day of April, 1980.

Elsijane T. Roy,
United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA ..... Plaintiff

v. LR-CR-80-8

CONRAD REAM, KEAT GRIGGERS, WILLIAM GORDON GREEN, FRED STALDER, ARDELL MEARS, ROBERT REAM, MICHAEL K. BENNETT, CHARLES B. MEDLEN ..... Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Green contends that the eyewitness identification of him by Joe Evan Kelly should be suppressed because the initial out-of-court identification was made under circumstances which were unnecessarily suggestive. The United States contends that the out-of-court identification was not impermissively suggestive; that the totality of the circumstances considered, there was no likelihood of irreparable misidentification.

On April 4, 1980 the defendant William Gordon Green's Motion To Suppress eyewitness identification was heard in open court and the Court makes the following determination based on the testimony:

FINDINGS OF FACT

1. Joe Kelly was arrested on October 4, 1978 in Heber Springs, Arkansas.

2. He subsequently became an informant for the United States, and he gave a statement on June 20, 1979 wherein he had flown from Tucson, Arizona to Bay City, Texas, to Colombia, South America, with two pilots: Keat Griggers and "Billy" whose last name was unknown. When he gave his first statement, he described "Billy" as a white male, about 36 years old, 5' 9", stocky build, light brown naturally curly hair, from Florida, and worked in the air-condition business in Florida. He said "Billy" was the co-pilot on the trip to Colombia.

3. Subsequent to the description being given to Drug Enforcement Administration Agent Robert D. Morris, a driver's license photograph was obtained of the defendant, William Gordon Green, from records in the State of Florida.

4. On approximately July 24, 1979, Joe Kelly flew by commercial airlines from California to Little Rock, Arkansas. The flight was an all night flight. When he arrived in Little Rock, he was taken to the office of the Drug Enforcement Administration in the Union Bank Building. DEA Agent Robert D. Morris showed Kelly one picture of William Gordon Green and asked Kelly if he recognized him. Kelly said he thought the man in the picture was the "Billy" he flew with, that he had the same features, but because he was so tired from the flight, he wanted to wait until after getting some sleep before making a positive identification. He did not want to make a mistake on a serious matter such as this was.

5. Agent Morris agreed, and Kelly left and got plenty of rest until the next morning. He came back to the DEA office, and he asked to see the picture again. Agent Morris showed him the same photograph as shown the day before and Kelly said he was positive the person in the picture was "Billy" with whom he had flown to South America.

6. Kelly, on September 22, 1978, flew out to Tucson, Arizona, at the request of Conrad Ream to represent Ream's interests in a load of marijuana

which was to be smuggled into the United States from Colombia, South America. He flew by way of commercial airlines. When he was picked up at the Tucson, Arizona airport by Conrad Ream, "Billy" was introduced to him by Ream as one of the pilots with whom he (Kelly) was to fly to South America. Kelly then traveled in the same car with "Billy" to a motel and Kelly obtained a room. Later, "Billy", Kelly, and Ream had dinner together and talked about the upcoming trip. It developed that the trip would not be taken because the other pilot, Keat Griggers, had other commitments and could not fly. Kelly flew back to Florida, with instructions to return to Tucson the following week.

7. On September 29, 1978, Kelly flew back to Tucson and once again met with Ream and "Billy" and Keat Griggers. Kelly, "Billy" and Griggers ate together, went to a store together to get supplies for the trip, went to the airport together, boarded the plane together, and flew together to Bay City, Texas. Kelly sat next to "Billy" for the majority of the trip and talked to him. On arrival in Bay City, Texas, Griggers rented a car and drove himself and "Billy" and Kelly to a motel, where he rented three rooms. Griggers, Kelly and "Billy" had dinner together and

talked. The stop was made in Bay City to refuel the plane. The next morning they boarded the plane and flew approximately 12 hours to Colombia, South America where the hundreds of pounds of marijuana were loaded onto the plane. During the trip to South America, Kelly sat next to and talked to "Billy". While on the ground, "Billy" showed Kelly how to service oil to the plane. After the loading of the marijuana, the three men flew about 14 hours to the United States, landing on an airstrip near Heber Springs, Arkansas. Upon landing, Green helped Kelly unload the marijuana from the plane. After it was unloaded, "Billy" and Griggers took off as planned in the plane and left Kelly on the ground.

8. The evidence presented at the hearing on the defendants' motion to suppress, when considered in its entirety, demonstrates Kelly's overwhelming opportunity to observe "Billy", and Kelly had reason to be accurate as to his description and the impression of Billy was imprinted indelibly on his mind.

CONCLUSIONS OF LAW

1. The United States has the burden of proving by clear and convincing evidence that the identification testimony resulted from independent obser-

vation and not from a pretrial confrontation which is so impermissibly suggestive as to create a very substantial likelihood of misidentification. **Manson v. Brathwaite,** 432 U.S. 98, 113-116 (1977).

2. The determination of whether identification evidence should be suppressed must be based on all the circumstances and should focus on (1) the degree to which the pretrial confrontation was suggestive; (2) any exigencies justifying the suggestive procedure; and (3) the reliability of the identification. However, unnecessarily suggestive pretrial confrontation procedures, standing alone, do not violate due process. Reliability is the linchpin in determining the admissibility of identification testimony. **Manson v. Brathwaite, supra; United States v. Alden,** 576 F. 2d 772, 778 (8th Cir. 1978).

3. The factors to be considered in determining the reliability of identification evidence "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." **Neil v. Biggers,** 409 U.S. 188, 199-200

(1972). Kelly had plenty of opportunity to view defendant Green. Kelly ate meals with him, conversed with him, rode in an airplane for over 24 hours with him. There is overwhelming evidence that he had an opportunity to observe, had reason to be accurate and have the impression of Mr. Green imprinted indelibly in his mind, especially considering the seriousness of the crime and the manner of the venture both Kelly and Green were involved in.

4. The totality of circumstances considered, there is no likelihood of an irreparable misidentification. After Kelly made the all night trip to Little Rock from California, he was tired and did not want to make a positive identification. He said he thought the man in the picture was the same one with whom he had flown, but wanted to get some sleep before making a positive identification. He did so the next day. Even if showing the photograph was suggestive, and the Court does not find that the process was impermissible in the manner in which it was presented, there was clear and convincing evidence Kelly had adequate opportunity by independent observation to be able to identify the man who was with him on the flight and on the venture.

Submitted this ..... day of April, 1980.

/s/ Elsijane T. Roy,
United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES ..... Plaintiff

v. No. LR-CR-80-8

CONRAD REAM (1)
FRED STALDER (4)
ROBERT REAM (6)
MICHAEL K. BENNETT (7) ..... Defendants

O R D E R

A hearing on pending motions was held in this case on Monday, April 28, 1980. Both the Government and the defendants were given the opportunity of presenting witnesses. After consideration of the testimony presented and the arguments of counsel,

IT IS HEREBY ORDERED:

1. THE MOTION TO DISMISS filed by defendants on March 31, 1980 because of the alleged wrongful destruction of a substantial part of the substance (allegedly marijuana) seized by the officers, is denied. The seizure and later destruction was under

the supervision of, and at the direction of, the state and local officials. The federal officials were present but did not participate in the decision to destroy the material. There was no showing at any time that the federal officials acted in bad faith nor with malice toward the defendants. Furthermore, the defendants failed to carry the burden of showing that any prejudice resulted to them from the destruction of the seized material. The testimony of Mary Buehler, the chemist from the State Crime Laboratory, was uncontroverted. She testified that she took 18 random samples from the bundles and boxes as they were untied and lifted by forklift to the incinerator. There was no opportunity for tampering. She also testified that these samples were, and have at all times been, available to defendants for their analysis. For the foregoing reasons, the Motion to Dismiss is denied.

2. The oral motion of Conrad Ream and Fred Stalder to dismiss the indictment as to them because of improper statements and/or questions by Don Curdie, Assistant United States Attorney, at the time of the hearing before the Grand Jury, is hereby denied.

3. THE MOTION OF DEFENDANTS FOR DISMISSAL ON THE GROUND OF DOUBLE JEOPARDY is denied because of the well-established legal principle that state prosecution does not bar a federal action against the same person for the same acts because the prosecutions are under the laws of separate sovereigns and do not subject the defendant to double jeopardy, **U.S. v. Wheeler**, 435 U.S. 313.

4. A discussion regarding the motion to demand notice of alibi witnesses was held; defendants stated there were none.

5. THE UNITED STATES' MOTION IN LIMINE AS TO KEAT GRIGGERS, JOE KELLY, AND MALCOLM GAUSTAD are granted. The Court finds under the applicable rules of the Federal Rules of Evidence that the prior arrests referred to in the rap sheets and oral testimony before the Court indicated that the crimes of which they were accused had either not resulted in convictions or they were felonies which were more than 10 years old or they were misdemeanors which did not involve dishonesty or false statements.

6. THE UNITED STATES' MOTION IN LIMINE AS TO ARDELL MEARS is granted, and no

reference may be made to the fact that he remained silent and did not testify before the grand jury.

7. The Court reserved ruling on the United States' Motion in Limine regarding Conrad Ream and Robert Ream until the issues are presented in the light of trial. However, defendants' attorneys are directed not to mention in opening statements the matters referred to therein.

8. Discussion was had regarding the motion of the United States that defendants not be permitted to present witnesses who allegedly bought marijuana from Sheriff Ron Davis. No relevancy was shown at pretrial, and the Court as a preliminary determination holds such testimony would be inadmissible; however, the Court will reserve barring such testimony if defendants at trial can show that it would be relevant to their defense.

Dated this 30th day of April, 1980.

Elsijane T. Roy,
United States District Judge